



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 238 OF 2016

JOHN NATABOBA.....CLAIMANT

VS

TICK SECURITY SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 12.5.2015. It is the claimant's case that the reason for his dismissal was because he failed to go on transfer and appealed for reconsideration because of his personal reason and inconvenience. It is however further claimant's case that the procedure followed to terminate the claimant's contract was unfair and in breach of the Employment Act and the international Law.

2. The suit was not defended despite service of summons and pleading on the respondent. The suit, therefore, proceeded ex parte by way of written submissions on the basis of the pleadings, witness statement and documentary evidence filed.

Analysis and Determination

3. There is no dispute that the claimant was employed by the respondent as a security guard from 1.7.2014 until 12.5.2015. There is also no dispute that the claimant was given a transfer by his employer to another station. There is further no dispute that after the transfer another guard replaced the claimant and his place of assignment. Finally there is no dispute that the claimant appealed against the transfer but the appeal was unsuccessful and he was sent home indefinitely. The issues for determination are:-

(a) Whether the claimant was unfairly terminated.

(b) Whether the reliefs sought to issue.

Unfair termination

4. Under section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondent did not file defence and therefore did not plead and prove that he had a valid and fair reason for dismissing the claimant from work.

5. In addition she did not also prove that she followed a fair procedure before terminating the claimant's services. She never proved that she gave claimant a prior notice as required by section 36 of the Act or accorded him a hearing under section 41 of the Act before dismissing him. Consequently I do not estate to find and hold that the termination of the claimant's services was unfair.

Reliefs

Notice and Compensation

6. Under section 49 of the Act, I award the claimant one month salary in lieu of notice plus 3 months salary as compensation for unfair termination. In making the award, I have considered the short period served by the claimant and the fact that he could not secure alternative employment in less than 3 months period after the termination. Based on the minimum wage of kshs,12,221 under 2015 General Wage Order plus 15% house allowance I award the claimant kshs.14,176.50 for notice plus kshs.42,529.50 as compensation.

Underpayment

7. The claimant prayed for under payment based on 2013 and 2015 General Wage Orders. The minimum wage order 2013 Wage Order was kshs.10,911.70. From 1.7.2014-31.3.2015, he was receiving kshs 4,500 per month representing underpayment of kshs.6,411.70 per month. For the 9 months he was underpaid by kshs.57,705.30. From April 2015 his salary was increased to kshs.6,500. He is therefore awarded kshs.4,411.70 for April 2015. From May 2015, the minimum wage was increased to kshs.12,221.10 and his underpayment in that month was $kshs.5721.10 \times 12/26 = kshs.2640.50$. The total underpayment was therefore kshs.64,757.50.

Annual leave

8. The claimant worked for about one year representing 21 leave days. He is therefore awarded $kshs.12221.10 \times 21/26 = 9870.90$

Public Holidays

9. The claimant has given particulars of the Public holidays worked as 29.7.2014 (Idd ul fitr), 20.10.2014(Mashujaa day), 24.10.2014(Feast of Sacrifice), 12.12.2014(Jamhuri day), 25.12.2014 (Christmas day), 26.12.2014(Boxing day), 1.1.2015(New year), 3.4.2015 (Good Friday), 6.4.2015(Easter Monday), and 1.5.2015 (Labour day). I award pay for all the Public holidays except 24.10.2014(Feast of Sacrifice) for lack of evidence. That totals to 9 Public holidays x ksh. 523.60 per day=kshs.4,712.40

Rest days

10. The contention that claimant worked for 7 days has not been contested by the defence. I therefore award him $kshs.523.60 \times 43$ rest days= kshs.22,514.80.

Overtime

11. The claimant avers that he worked overtime from 6pm to 9.00am the following day representing 3 hours overtime. Based on ksh.98.40 per hour under the 2013 General Wage Order, the claimant is entitled to ksh.442.8 per day for overtime worked. Consequently I award him kshs.139,924.80 for the 316 days worked.

House Allowance

12. The claimant prays for arrears of house allowance for 10 months at the rate of 15% of the basic salary of kshs.10,911.70 prescribed by the 2013 Wage order. I agree with him and award him $kshs.10,911.70 \times 15/100 \times 10 = 16,367.55$.

Certificate of Service

13. I grant the prayer for Certificate of Service because it is a statutory right to every employee.

Disposition

14. For the reasons started above I enter judgment for the claimant in the sum of **kshs.315,206.95** plus costs and interest. The claimant will also have Certificate of Service.

Signed, dated and delivered at Mombasa this 13th day of January 2017

O.N. MAKAU

JUDGE